United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, the Internet, and Intellectual Property

Hearing on House Bill 2723
"Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003"
Tuesday, October 21, 2003, 2:00 p.m.
Rayburn House Office Building Room 2141
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Written Testimony of
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Good afternoon, Chairman Smith and Members of the Subcommittee. My name is Diarmuid O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit with chambers in Portland, Oregon. Thank you for inviting me, once again, to discuss the future of the Ninth Circuit. You sought my views in the 2002 hearings on H.R. 1203. I am especially honored to be called upon to comment on H.R. 2723, a bill that offers an even better solution to the problems inherent in the size of so large and overburdened a circuit as ours. In particular, H.R. 2723 is laudable for recognizing and directly responding to nearly every argument lodged against its predecessors. Congressman Simpson, its sponsor, has gone out of his way to solicit the views of our Court and it is evident that H.R. 2723 was drafted with uncommon sensitivity to the concerns of judges on my Court.

I can report that I speak not only on my own behalf, but also eight of my colleagues–Judges Sneed (California), Beezer (Washington), Hall (California), Trott (Idaho), Fernandez (California), T.G. Nelson (Idaho), Kleinfeld (Alaska), and Tallman (Washington)–who publicly support the restructuring of the Ninth Circuit.[1]

I

I have served as a federal appellate judge for more than a decade and a half on what has long been the largest court of appeals in the federal system (now 48 judges, soon to be 50).[2] I have also written and spoken repeatedly on issues of judicial administration.[3] Therefore, I feel well qualified to share my perspectives

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[1] Of course, I do not speak for the Court of which I am a member.

[2] I previously served as Administrative Judge for the Northern Unit of our Court and for two terms as a member of our Court's Executive Committee.

[3] See Statement of Diarmuid F. O'Scannlain, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002); Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States Senate, Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and S. 253, The Ninth Circuit Reorganization Act (July 16, 1999); Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States House of Representatives, Oversight Hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (July 22, 1999); Diarmuid F. O'Scannlain, Should the Ninth Circuit be Saved?, 15 J.L. & Pol. 415 (1999); Diarmuid F. O'Scannlain, A Ninth Circuit Split Commission: Now What?, 57 Mont. L. Rev. 313 (1996); Diarmuid F. O'Scannlain, A Ninth Circuit Split is Inevitable, But Not Imminent, 56 Ohio St. L. J. 947 (1995).

on our mutual challenge to address the judiciary's 800-pound gorilla: The United States Court of Appeals and the fifteen District Courts which comprise the Ninth Judicial Circuit.

I appear before you as a judge of one of the most scrutinized institutions in this country. In many contexts, that attention is negative, resulting in criticism and controversy. Some view these episodes as fortunate favors, sparking renewed interest in how the Ninth Circuit conducts its business.[4] But a restructuring proposal like H.R. 2723 should be analyzed solely on grounds of effective judicial administration; grounds that remain unaffected by Supreme Court batting averages and public perception of particular decisions. However one views our jurisprudence, my support of a fundamental restructuring of the Ninth Circuit, I want to emphasize, has never been premised on the outcome of given cases.

Restructuring the circuit is the best way to cure the administrative ills affecting my court, an institution that has already exceeded reasonably manageable proportions. Nine states, twelve thousand annual case filings, forty-eight judges, and fifty-six million people are too much for any non-discretionary appeals court to handle satisfactorily. The sheer magnitude of our court and its responsibilities negatively affects all aspects of our business, including our celerity, our consistency, our clarity, and even our collegiality. Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the natural evolution of judicial organization. Restructuring has worked in the past. Restructuring will work again. For these reasons alone, I urge serious consideration of H.R. 2723.

I did not always feel this way. When I was appointed in 1986 I opposed any alteration of the Ninth Circuit. I held to this view throughout much of the '80s, largely because of the widespread perception that dissatisfaction with some of our environmental law decisions animated the calls for reform.

I changed my views in the early '90s while completing an LL.M. in Judicial Process at the University of Virginia. The more I considered the issue from the judicial administration perspective, the more I rethought my concerns. The objective need for a split became obvious. One could no longer ignore the compelling reasons to restructure the court, whether or not one agreed with anyone else's reasons for doing so.

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[4] See, e.g., Bruce Ackerman, The Vote Must Go On, N.Y. Times, Sept. 17, 2003, at A27; Adam Liptak, Court That Ruled on Pledge Often Runs Afoul of Justices, N.Y. Times, June 30, 2002, at A1.

Since then, I have learned a great deal about the severe judicial administration problems facing the Ninth Circuit. I have studied them and experienced them first hand, and I would like to share my thoughts and conclusions.

II

When the circuit courts of appeals were created over one hundred years ago by the Evarts Act of 1891, there were nine regional circuits. Today, there are twelve. For much of our country's history, each court of appeals had only three judges. Indeed, the First Circuit was still a three-judge court when I was in law school. Over time, in an effort to stave off an explosion in appellate litigation, the circuits expanded as Congress added new judgeships. Courts grew to six, ten, even seventeen judges.

At a certain point, larger circuits became unwieldy because of their size. Lawmakers recognized that adding new judges served only as a temporary anodyne rather than a permanent cure. Instead, Congress wisely restructured larger circuits. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the enactment of the Evarts Act.[5] Part of the Eighth Circuit became the Tenth Circuit in 1929, while portions of the Fifth begat the Eleventh in 1981. The next year saw the creation of the Federal Circuit. And, in due course, I have absolutely no doubt that a new Twelfth Circuit will be created out of the Ninth, hopefully through legislation such as H.R. 2723.

Congress formed each new circuit, at least in part, to respond to the very real problems posed by overburdened predecessor courts. That same rationale applies with special force to the Ninth Circuit, as many experts acknowledge. Indeed, the White Commission of 1998,[6] and the Hruska Commission of 1973[7] before it, both concluded that the Court of Appeals for the Ninth Circuit is too big. Regardless of which party controlled Congress when the commissions were authorized, each concluded that the Ninth Circuit needs restructuring because of its unsustainable size.

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[5] The original name of this court was the Court of Appeals for the District of Columbia. In 1934, this court was renamed the United States Court of Appeals for the District of Columbia.

[6] See Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998) [hereinafter "White Commission Report"].

[7] See Commission on the Revision of the Federal Court Appellate System, Final Report (1973) [hereinafter "Hruska Commission Report"].

And the sheer enormousness of my court is undeniable, whether you measure it by number of judges, by caseload, or by population. Our official allocation is 28 active judges—equal to or more than the total number of judges, active and senior combined, on any other circuit. Currently, 27 of those judgeships are filled, and we have an additional 21 senior judges. In other words, there are forty-eight judges on our court today. And when the one existing and one imminent vacancies are filled, our court will have 50.[8]

I should pause to put that figure in perspective. At close to fifty judges, the Ninth Circuit is approaching twice the number of total judges of the next largest circuit (the Sixth with 28), and already has more than four and a half times that of the smallest (the First with 11).[9] Indeed, there are more judges currently on the Ninth Circuit than there were in the entire federal judiciary at the birth of the circuit courts of appeals. And every time a judge takes senior status, we grow ever larger. Meanwhile, compared to our 48 judges, the average size of all other circuits today remains at less than 19 judges.

Even with the lumbering number of judges on our Circuit, we can hardly keep up with the immense breadth and scope of our Circuit's caseload. In the 2002 court year, we handled 11,271 appeals—over double the average of other circuits, and almost twenty-five hundred more cases than the next busiest court (the Fifth).[10] Unfortunately, these numbers will only increase, and indeed have: as of three weeks ago, the end of the 2003 court year, that volume climbed to 12,632 filings.[11] Along with a double-digit growth in overall appeals,[12] we have

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[8] See Exhibit 3. Senior judges are in no sense "retired." Almost all of our senior judges carry a substantial load ranging from 100 percent to 25 percent of a regular active judge's load.

[9] See Exhibit 7; Exhibit 15.

[10] See Exhibit 9; Exhibit 13; Exhibit 16. There may be slight variations in terms of the summary statistics reported here and those reported elsewhere because of differences in sources. For the Ninth Circuit, I use our internally generated caseload reports from the AIMS database. For all other circuits, I use caseload statistics provided by the Administrative Office of the United States Courts in a report entitled Judicial Business of the United States Courts: 2002 Annual Report of the Director. Unless otherwise noted, all caseload statistics reflect appeals filed in fiscal year 2002, from October 1, 2001 to September 30, 2002. For all circuits, I use population statistics compiled by the United States Census Bureau for year 2002.

[11] See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003.

[12] Only three other circuits reported an increase in their appeals between 2001 and 2002, and none higher than 7.8% (the Second). The Ninth Circuit, on the other hand, saw a 10.4% jump over the same time period. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director. The jump for the

seen a marked upswing in immigration appeals. Recently, the Board of Immigration Appeals streamlined its review procedures—often abandoning three judge panels in favor of one judge summary affirmances—in an effort to clear its backlog. Because we hear BIA appeals directly from the Board, we suffer the immediate effects of this policy change. For court year 2003, we received around eighty immigration appeals each and every week.[13] Indeed, immigration appeals now make up about a third of the Ninth Circuit's docket.[14]

By population, too, does our circuit dwarf all others. The Ninth Circuit's nine states and two territories range from the Rocky Mountains and the Great Plains to the Sea of Japan and the Rainforests of Kauai, from the Mexican Border and the Sonoran Desert to the Bering Strait and the Arctic Circle. This vast expanse houses more than 56 million people—about one fifth of the entire population of the United States. That is 25 million more people than the next largest circuit (the Sixth).[15] Twenty-five million is an astounding number—more than the aggregate population of the ten largest cities in America combined.[16]

No matter what metric one uses, the Ninth Circuit dwarfs all else. Compared to the other circuits, we employ twice the average number of judges, we handle twice the average number of appeals, and we have twice the average population.[17] The Ninth Circuit already equals two circuits in one.

Numbers alone cannot tell the whole story. From the standpoint of a firsthand observer, I have concluded that our court's size negatively affects the ability of us judges to do our jobs.

For example, I participated last year in eight, week-long sittings a year on regular panels. The composition of those panels often changes during a given week. Thus, I may sit with around twenty of my colleagues on three-judge panels

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2003 court year was even greater: 12.1%. See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003.

[13] See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003. Our database categorizes one class of appeals as "agency" appeals, of which we had 4,253 in fiscal year 2003. The overwhelming majority of these agency filings are immigration appeals.

[14] See id.

[15] See Exhibit 8; Exhibit 11; Exhibit 16.

[16] See U.S. Census Bureau, Cities Ranked by Estimated 2002 Population, http://eire.census.gov/popest/data/cities/tables/SUB-EST2002-01.php. The ten largest cities, in order, are New York, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Diego, Dallas, San Antonio, and Detroit.

[17] See Exhibit 15; Exhibit 16.

over the course of a year. That is less than half of the total number of judges on my court. Because the frequency with which any pair of judges hears cases together is quite low, it becomes difficult to establish effective working relationships in developing the law. Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Unlike a legislature, a court is expected to speak with one consistent, authoritative voice in declaring the law. But the Ninth Circuit's enormous size severely hinders us, creating the danger that our deliberations will resemble those of a legislative rather than a judicial body.

If we had fewer judges, three-judge panels could circulate opinions to the entire court before publication. This is the practice of many appellate courts. Pre-circulation not only prevents intra-circuit conflicts, it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than the public does—and frequently later, which can lead to some unpleasant surprises. Even with our pre-publication report system, we do not get the full implications of what another panel is about to do. For in addition to handling his or her own share of our now 12,000 plus appeals,[18] each judge is faced with the Sisyphean task of keeping up with all his or her colleagues' opinions—not to mention all the opinions issued by the Supreme Court and the relevant public and academic commentary. Without question, we are losing the ability to keep track of our own precedents. This is as embarrassing as it is intolerable. It is imperative that judges read our court's opinions as—or preferably before—they are published. This is the only way to stay abreast of circuit developments. It is the only way to ensure that no intra-circuit conflicts develop. And it is the only way to ensure that when conflicts do arise (which is inevitable as we continue to grow), they are considered en banc. This task is too important to delegate to staff attorneys, and too difficult for judges of the current Ninth Circuit adequately to do themselves.

Many point to the en banc process as a solution to some of these problems, but it is simply a band-aid. Theoretically, the ability to rehear en banc promotes consistency in adjudication by resolving intra-circuit conflicts once and for all. In my practical experience, however, this has not been the case in the Ninth Circuit. Only a fraction of our published opinions can receive en banc review. Last year

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[18] See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003.

we reexamined less than three percent of our published dispositions. Such a small fraction cannot significantly affect the overall consistency of a court that issued 718 published opinions in 2002 alone.[19] Moreover, all other courts of appeals in this country convene en banc panels consisting of all active judges. Yet the Ninth Circuit uses limited en banc panels comprised of eleven of the twenty-eight authorized judgeships. This limited en banc system appears to work less well than other circuits' en banc systems. Because each en banc panel contains fewer than half of the circuit's judges and consists of a different set of judges, en banc decisions do not incorporate the views of all judges and thus may not be as effective in settling conflicts or promoting consistency. A good example of this limitation is the recent California Recall case.[20] There, the original three-judge panel unanimously reversed a district court's denial of a preliminary injunction to stop the recall election. On rehearing en banc, an 11-judge, randomly selected panel affirmed the district court—also unanimously—to order the election to go forward. None of the original three judges wound up on the 11-judge panel. Most unusually, there are enough active judges on our court such that an entirely separate 11-judge panel could have been formed without a single member of either the original three-judge or actual en banc panel. Indeed, our circuit is only a few active judgeships away from being able to form three separate en banc panels simultaneously.[21] I do not suggest that our use of limited en banc panels is unwarranted; given our size, it would be an enormous drain on our resources to do it any other way. I only mean to point out the strains that we labor under—strains due entirely to our distended bulk.

The Ninth Circuit's enormous size not only hinders judicial decisionmaking, it also creates problems for our litigants. In my court, the median time from when a party activates an appeal to when it receives resolution is over 15 months—more than 67% longer than the average time for the rest of the Courts of Appeals.[22]

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[19] This is not to mention the over 4,000 non-precedential memorandum dispositions we circulate each year. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director.

[20] S.W. Voter Registration Educ. Project v. Shelley, 2003 WL 22176200 (9th Cir. 2003), rev'd, 2003 WL 22175955 (9th Cir. 2003) (en banc).

[21] Indeed, if the seven new judgeships contemplated by H.R. 2723 were added to our Circuit without a corresponding split, we would easily be able to form three simultaneous 11-judge en banc panels. This can only decrease the legitimacy of our already troubled en banc process.

[22] Thankfully, we are not the worst circuit in this regard, but we are a close second. See Administrative Office of the United States Courts, Judicial Business of the United States Courts:

More disturbingly, an unacceptable number of appeals wallow under submission for a year or more. Our record on this front is almost four times worse than the next slowest circuit (the Fourth).[23] Judges need time to deliberate and to ensure that they are making the correct decision, but this backlog increases the pressure on us to dispose of cases quickly. This, in turn, can only inflate the chance of error and inconsistency.

Also, because of the circuit's geographical reach, judges must travel on a regular basis from faraway places to attend court meetings and hearings. For example, in order to hear cases, my colleagues must fly many times a year from cities including Honolulu, Hawaii, Fairbanks, Alaska, and Billings, Montana to distant cities including Phoenix, Arizona and Pasadena, California. In addition, all judges must travel on a quarterly basis to attend court meetings – and en banc panels – generally held in San Francisco. A certain amount of travel is unavoidable, especially in any circuit that might contain our non-contiguous states of Alaska and Hawaii, not to mention our island territories. But why should any one circuit encompass close to 40% of the total geographic area of this country?[24] Traveling across this much land mass not only wastes time, it costs a considerable amount of money.

I am not alone in my conclusions. Several Supreme Court Justices have commented that the risk of intra-circuit conflicts is heightened in a court that publishes as many opinions as the Ninth.[25] Furthermore, after careful analysis, the White Commission concluded that circuit courts with too many judges lack the ability to render clear, consistent, and timely decisions.[26] And as consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of

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2002 Annual Report of the Director.

[23] See id.

[24] See U.S. Census Bureau, State and County "QuickFacts," available at http://quickfacts.census.gov/qfd/.

[25] See White Commission Report at 38.

[26] The White Commission's principal findings told us: (1) that a federal appellate court cannot function effectively with a large number of judges; (2) that decisionmaking collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decisionmaking unit smaller than what we now have; (3) that a disproportionately large proportion of lawyers practicing before the Ninth Circuit deemed the lack of consistency in the case law to be a "grave" or "large" problem; (4) that the outcome of cases is more difficult to predict in the Ninth Circuit than in other circuits; and (5) that our limited en banc process has not worked effectively.

discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. Predictability is clearly difficult enough with 28 active judgeships. But this figure understates the problem. It fails to consider both senior judges (most of whom work prodigiously), and the large numbers of visiting district and out-of-circuit judges who are not even counted as part of our 48-judge roster. Notably, the White Commission also concluded that federal appellate courts cannot function effectively with as many judges as the Ninth Circuit has. It also concluded that our limited en banc process has not worked effectively.

What the experts tell us—and what my long experience makes clear to me—is that the only real resolution to these problems is to have smaller decisionmaking units. The only viable solution, indeed the only responsible solution, is to effect a split, and to carve out a new Twelfth Circuit.

III

Everyone recognizes these problems, but not everyone agrees that a split is the ideal solution. In fact, on this point, my own Chief Judge and I appear to disagree, although each with the greatest of respect for each other's views. However, I remain unconvinced by the various arguments against a split. Indeed, the special virtue of H.R. 2723 is that it addresses substantially all of the arguments against H.R. 1203 advanced by Chief Judge Schroeder and Judge Sidney Thomas at last year's hearings.

As an initial matter, the restructuring provided by H.R. 2723 corrects many of the problems currently facing my court. It creates smaller decisionmaking units, which in turn fosters collegiality among judges, greater decisional consistency, increased accountability, and responsiveness to regional concerns. And as it moves forward, the new Twelfth Circuit should still be bound by pre-split precedent, helping to minimize confusion in interpreting the law.

Like last year's bill, H.R. 2723 creates a new Twelfth Circuit comprised of the Northwestern states and the Pacific Islands (Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam, and the Northern Mariana Islands).[27] The "new" Ninth Circuit would retain California, Nevada, and Arizona.[28] Unlike H.R. 1203, however, H.R. 2723 includes some very important and much-needed elements. First, it adds five new judgeships and two temporary ones—all located in the

[27] See Exhibit 2.
[28] Id.

reconfigured Ninth Circuit. Total active judges would increase for at least the next ten years to 35, with 26 allocated to the Ninth Circuit and 9 to the Twelfth.[29] Second, it dramatically reduces administrative costs in the reconfigured circuits by liberally allowing the sharing of judicial resources.

The increase in judgeships for the new Ninth Circuit is particularly notable. Last year, Chief Judge Schroeder's primary objection to H.R. 1203 was that it did "not address the growing need for additional judgeships."[30] As Chief Judge Schroeder pointed out, these additional judgeships are sorely needed, as there have been no additional judgeships added to the Circuit since 1984. Yet H.R. 2723's seven additional judgeships answers this protestation in spades.

I also commend H.R. 2723 for placing all seven of its new judges in the reconfigured Ninth Circuit. Judge Sidney Thomas criticized last year's proposal because it did not result in a proportional caseload distribution. The additional judges in California, Arizona, and Nevada help equalize their share of appellate work. Under last year's proposal, the new Ninth Circuit would have been left with close to 80% of its caseload, while losing almost a third of its judges to the Twelfth Circuit. This year, in contrast, H.R. 2723's provisions result in only a marginal caseload disparity. The Twelfth Circuit would take almost 20% of the caseload and, factoring in the additional judgeships, about 25% of the judges. Given the relatively small numbers of judges involved, it is hard to get much closer than that. And, of course, I have no doubt that most—if not all—of the new Twelfth Circuit judges would gladly volunteer on new Ninth Circuit panels to help ease any growing pains. I myself would be assigned to the Twelfth Circuit but would be more than happy to help out the new Ninth on a regular basis as needed.

Moreover, the new Ninth Circuit would have, on average, 349 appeals filed per authorized judgeship.[31] That yields a workload barely 7% higher than the average of all other circuits, at 325.[32] Indeed, the new Ninth Circuit would have fewer per-authorized-judge cases filed than the Second, Fifth, and Eleventh Circuits, and not many more than the Seventh.[33]

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[29] See Exhibit 4; Exhibit 5.

[30] Statement of Mary M. Schroeder, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002).

[31] See Exhibit 5; Exhibit 18.

[32] See id.

[33] See id.

These figures help demonstrate the fallacy of Judge Thomas's "critical mass" argument. Last year, he asserted that the proposed Twelfth Circuit was too small to stand on its own.[34] Although the area is growing, the Twelfth Circuit would begin as one of our smaller circuits. But the idea that it could not form a legitimate circuit is plainly untrue. At 2,186 total appeals filed, the Twelfth Circuit already would process more litigation than the First and D.C. Circuits, and would be within a few hundred appeals of the Tenth.[35] By appeals filed per authorized judgeship, the Twelfth Circuit, at 243, exceeds the Tenth and D.C. Circuits, and is less than fifty away from each of the First, Third, Sixth, and Eighth Circuits.[36] The suggestion that the Twelfth Circuit would be too small impugns each one of these already hardworking circuits.

Finally, H.R. 2723 answers both Chief Judge Schroeder's and Judge Thomas's concerns about administrative efficiency. Congressman Simpson's proposal explicitly allows each new circuit to continue our practice of assigning circuit and district judges throughout the area served by the old Ninth Circuit in times of need. I have no doubt that the Chief Judges of the new Ninth and Twelfth Circuits willingly would approve sharing their resources. I applaud H.R. 2723 for codifying and even expanding such a beneficial system. To allow the sharing of resources—not only among but between circuits—will serve as an unqualified boon to our efforts in managing heavy caseloads. Indeed, these important provisions of H.R. 2723 essentially provide an unprecedented double benefit. Nearly all of the important administrative innovations we have instituted over the last few years may be shared between the two circuits. At the same time, each circuit receives all the benefits of reorganization into new circuits. For example, as each circuit develops intimate familiarity with a greatly decreased number of lower court rules and methodologies, we should see the immediate productivity gains inherent in a more cohesive geographical unit. These gains may help counter the Ninth Circuit's recent productivity decrease in the number of appeals it terminates per year,[37] a decrease demonstrating that our administrative reforms

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[34] See Statement of Sidney R. Thomas, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002).

[35] See Exhibit 16; Exhibit 18.

[36] See id.

[37] See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director.

alone simply are not working. Rather, we need precisely the kind of pioneering solution H.R. 2723 provides.

Some of Chief Judge Schroeder's and Judge Thomas's objections survive H.R. 2723. Alas, these are the same arguments that no reorganization bill can answer, as they amount to nothing more than a plea to keep the gigantic Ninth Circuit intact.

For example, one suggestion is that the Ninth Circuit should stay together to provide a consistent law for the West generally, and the Pacific Coast specifically. This is a red herring. The Atlantic Coast has five separate circuits, but freighters do not appear to collide more frequently off Long Island than off the San Francisco Bay because of uncertainties of maritime law back East. This is absurd, as is the "need" to preserve a single law for the Pacific Coast. The same goes for the desire to adjudicate a cohesive "Law of the West." There is no corresponding "Law of the South" nor "Law of the East." The presence of multiple circuits everywhere else in the country does not appear to have caused any deleterious effects whatsoever. In fact, our long history with Circuit Courts of Appeals demonstrates that more discrete decisionmaking units enhance our judicial system. We should not be treated differently for the reason that our borders were fixed inviolate in 1891. Indeed, the most naturally coherent geographic division would separate the Northwest and Southwest, each with its own climates and cultures. This is precisely the division H.R. 2723 effects.

Nor should cost alone be a reason to maintain the status quo. I respectfully disagree with my Chief's conclusion that the Twelfth Circuit would require a new courthouse and administrative headquarters with wild estimates in the hundreds of millions of dollars. There are far simpler—and far cheaper—solutions. The Gus Solomon Courthouse in Portland has remained unoccupied since the construction of the Mark Hatfield Courthouse for the District of Oregon. Likewise, the Nakamura Courthouse in Seattle will soon empty when the Western District of Washington moves to its newly constructed building. Either of these physical plants would be appropriate for the Twelfth Circuit's administrative headquarters. Neither would require new building costs, aside from relatively modest design and remodeling expenses.

I concede that there are judges on the Ninth Circuit who believe the disadvantages of splitting the circuit outweigh the advantages. But as a member of that court, I must take issue with the innuendo that they represent an overwhelming majority. Some judges decline to express any view, feeling the matter is entirely a legislative issue. Yet a great number of judges on our court

favor some kind of restructuring, many strongly so. Perhaps you might suggest that our Chief Judge poll our Court in light of the sincere new approach made by the sponsors of H.R. 2723. So far, she has refused to do so. But our judges are not the only ones who may support a restructuring. Each of the five Supreme Court Justices who commented on the Ninth Circuit in letters to the White Commission "were of the opinion that it is time for a change."[38] The Commission itself reported that, "[i]n general, the Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intra-circuit conflicts in a court with an output as large as that court's."[39] Many district court judges and practitioners concur as well. Some bar members, on the other hand, do not seem to care who gets appointed to this large circuit—by the luck of the draw they can get a friendly panel, or if not, a randomly selected en banc panel can give them a second shot.

IV

Finally, I would like specifically to respond to one of Chief Judge Schroeder's recent public statements on the issue of restructuring our circuit. In her most recent "State of the Circuit" speech,[40] our Chief made the astonishing assertion that "split proposals must realistically be viewed as a threat to judicial independence." This is directly contrary to over a century of Congressional legislation of circuit structure, and cannot be true. Bills such as H.R. 2723, with its panoply of provisions that directly respond to the concerns the Chief Judge articulated last year, demonstrate the good-faith efforts made by Congress reasonably to restructure the judicial monstrosity of the Ninth Circuit. Calling for a circuit split based on particular decisions is counterproductive and unacceptable. But so is attacking the integrity of Congress when it makes honest and fair proposals to divide our circuit.

There is nothing unusual, unprecedented, or even unconstitutional about the restructuring of judicial circuits. Federal appellate courts have long evolved in response to natural population and docket changes. As geographic or legal areas grow ever larger, they divide into smaller, more manageable judicial units. No circuit, not even mine, should resist the inevitable. Only the barest nostalgia

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[38] White Commission Report at 38.

[39] Id.

[40] Mary M. Schroeder, State of the Circuit Speech at the 2003 Ninth Circuit Judicial Conference, Kauai, Hawaii (June 23, 2003).

suggests that the Ninth Circuit should keep essentially the same boundaries for over a century. But our circuit is not a collectable or an antique. We are not untouchable. We are not something special, or an exception to all other circuits. We are not some "elite" entity immune from scrutiny by mere mortals. The only consideration is the optimal size and structure for judges to perform their duties. There can be no legitimate interest in retaining a configuration that functions ineffectively. Indeed, I am mystified by the relentless refusal of some of my colleagues to contemplate the inevitable.[41] As loyal as I am to my own court, I cannot oppose the logical evolution of the Ninth Circuit as we grow to impossible size.

After denying these concerns, our past official court position straddles the fence by arguing that we can alleviate problems by making changes at the margin. Chief Judge Schroeder and her predecessors have done a truly admirable job with the limited tools they have, chipping away at the mounting challenges to efficient judicial administration. However, I do not believe that long-term solutions to long-term problems come from tinkering at the edges. Courts of appeals have two principal functions: Correcting errors on appeal and declaring the law of the circuit. Simply adding more judges may help us keep up with our error-correcting duties, but it severely hampers our law-declaring role. More judges make it more difficult to render clear and consistent decisions. The time has come when such cosmetic changes can no longer suffice and when a significant restructuring is necessary.

All this is not to say that H.R. 2723 could not be improved. The new Ninth Circuit would still have a disproportionate share of the country's population and case filings. This raises the pervasive question of what to do with California, which currently accounts for about two thirds of our Court's current caseload.[42] Some suggest that California should be its own freestanding circuit. Others would divide California in half as parts of new Southwest and Northwest Circuits.[43] Either way, H.R. 2723 may offer only a short-term reprieve. For, with 26 active judges, the new Ninth Circuit would soon face many of the same issues I have

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[41] See, e.g., Ninth Circuit in "Very Good" State, but Needs More Judges, Schroeder Tells Federal Bar Association Chapter, Metropolitan News-Enterprise, April 4, 2002, at 3; Procter Hug, Jr. & Carl Tobias, A Split By Any Other Name . . ., 15 J.L. & Pol. 397 (1999); Procter Hug, Jr., The Ninth Circuit Should Not Be Split, 57 Mont. L. Rev. 291 (1996).

[42] See Exhibit 14; Exhibit 18.

[43] Incidentally, this was the recommendation of the Hruska Commission in 1973. See supra note 7, at 2.

emphasized today. But, for the present, the "new" Ninth would be adequately provided for, and the Twelfth would be immeasurably better served.

Whatever you choose to do, ultimately Congress must restructure the Ninth Circuit. This task has been delayed far too long, and each day the problems get worse. I do not mean to imply that our circuit as a whole is beyond the breaking point. I want to emphasize that our Chief Judge and the Clerk of the Court are doing a marvelous job of administering this circuit. Instead, my focus is on where we go from here. If the Ninth Circuit Court of Appeals has not yet fallen, it is certainly at the edge of a precipice. Only a restructuring can bring us back. H.R. 2723, with its commendable efforts at answering all major objections to past proposals, provides just the life rope we need.

V

Unfortunately, the Ninth Circuit's problems will not go away. They will only get worse. This issue has already spawned, both within and outside the court, too much debate, discussion, reporting, and testifying, and for far too long. We need to get back to judging. I ask that you mandate some kind of restructuring now. One way or another, the issue must be put to rest so that we can concentrate on our sworn duties and end the distractions caused by this never-ending controversy. I urge you to give serious consideration to H.R. 2723.

Thank you, Mr. Chairman, for allowing me to appear before you today. I would be happy to answer any questions you may have.

APPENDIX

Exhibit 1 - Current Regional Circuits

Exhibit 2 - Circuits After Restructuring Proposed by H.R. 2723

Exhibit 3 - All Ninth Circuit Judges by Seniority

Exhibit 4 - Judges for the "New" Ninth Circuit After Split

Exhibit 5 - Judges for the New Twelfth Circuit After Split

Exhibit 6 - Number of Authorized Judgeships by Circuit

Exhibit 7 - Total Number of Judges by Circuit

Exhibit 8 - Population by Circuit

Exhibit 9 - Number of Appeals Filed by Circuit

Exhibit 10 - Ninth Circuit Judges Versus Other Circuits' Average

Exhibit 11 - Ninth Circuit Population Versus Other Circuits' Average

Exhibit 12 - Ninth Circuit Population Versus Fifth and Eleventh Combined

Exhibit 13 - Ninth Circuit Appeals Filed Versus Other Circuits' Average

Exhibit 14 - Ninth Circuit Appeals Filed by State

Exhibit 15 - Number of Judges by Circuit

Exhibit 16 - Population and Caseload by Circuit

Exhibit 17 - Population and Number of Appeals by District within Ninth Circuit

Exhibit 18 - Population and Number of Appeals by State within Ninth Circuit

Exhibit 1

The Current Regional Circuits: The largest by far is the Ninth with about a fifth of the total population and close to 40% of the total land mass of the United States

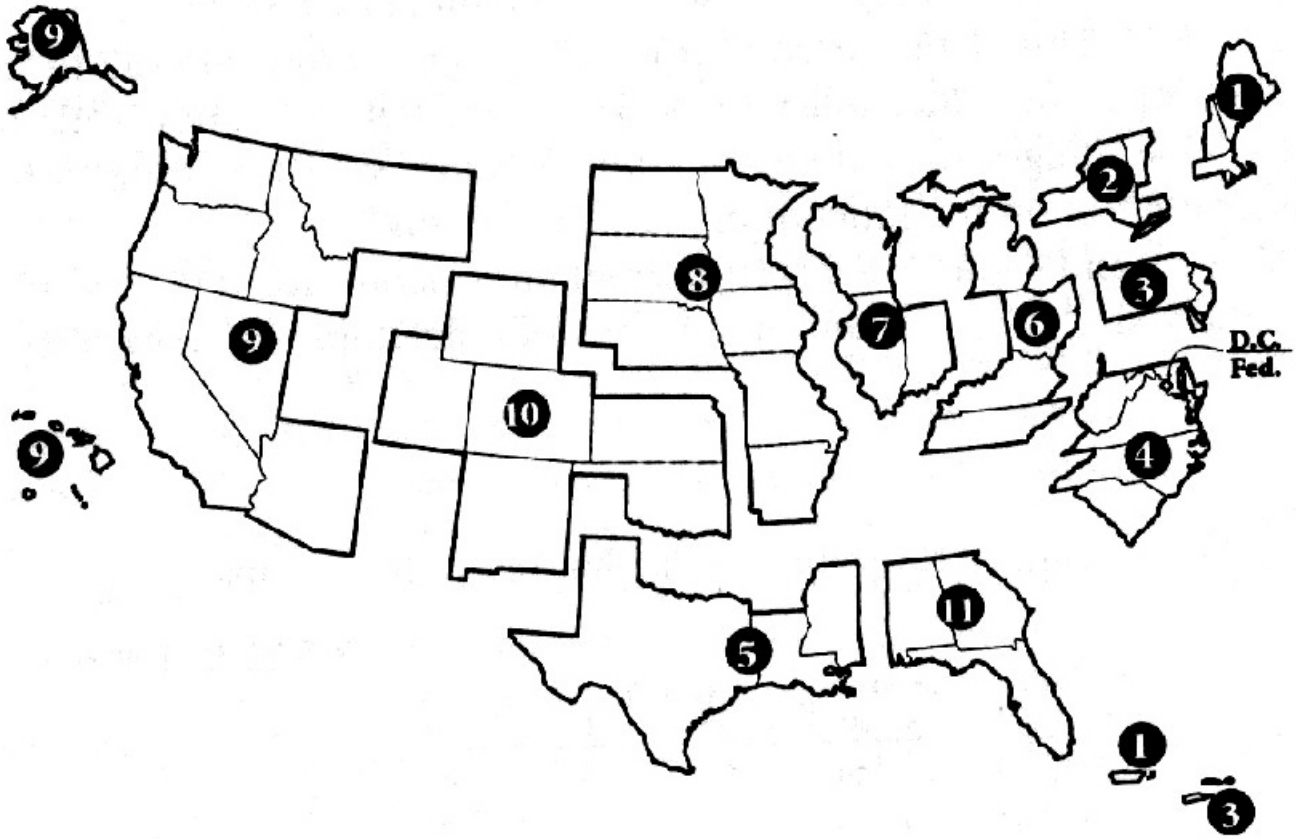


Exhibit 2

The Circuits After the Restructuring Proposed by H.R. 2723

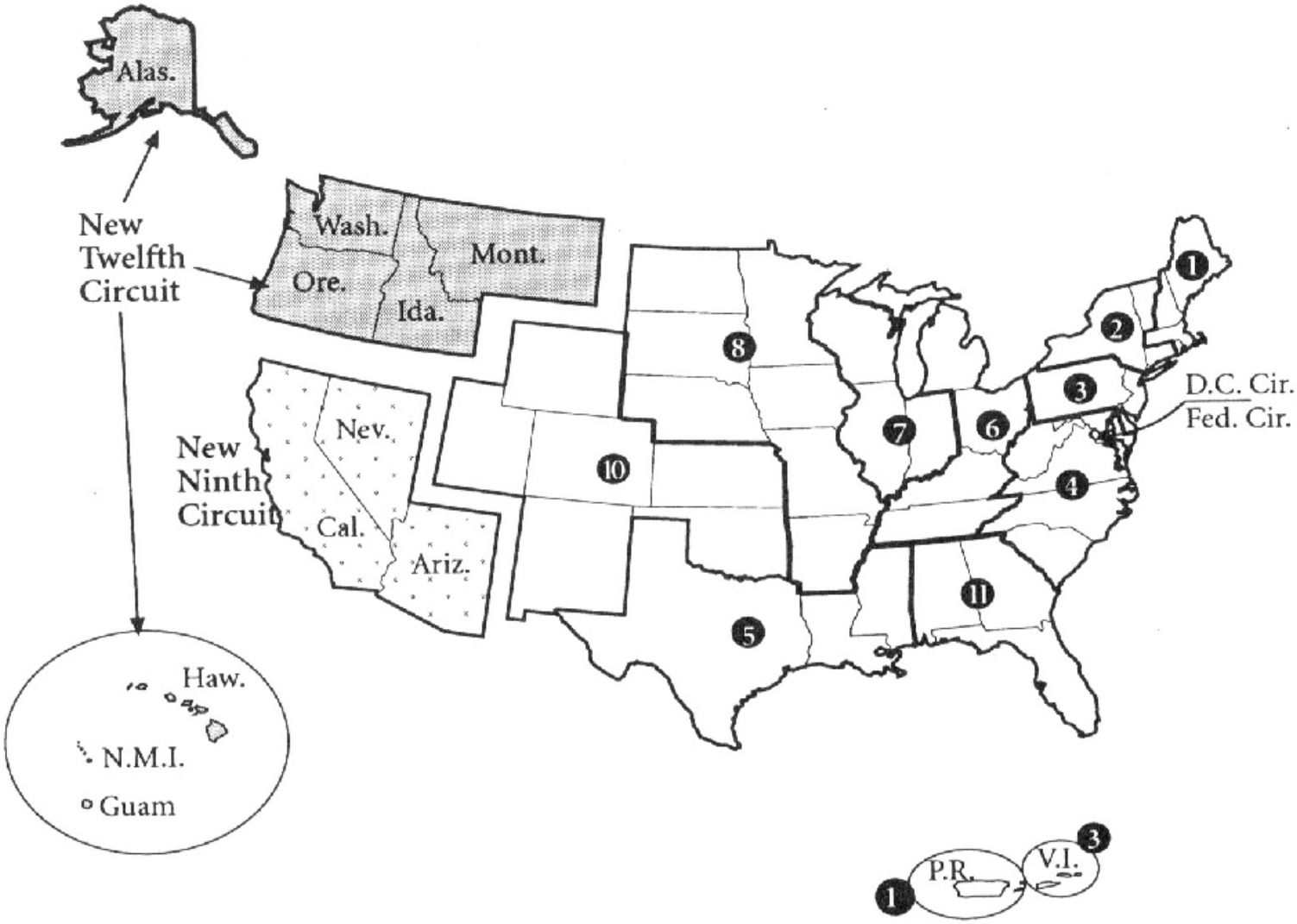


Exhibit 3

All Ninth Circuit Judges by Seniority

(as of October 21, 2003)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	Senior
2. Choy	Nixon	Hawaii	Honolulu	Senior
3. Goodwin	Nixon	California	Pasadena	Senior
4. Wallace	Nixon	California	San Diego	Senior
5. Sneed	Nixon	California	San Francisco	Senior
6. Hug	Carter	Nevada	Reno	Senior
7. Skopil	Carter	Oregon	Portland	Senior
8. Schroeder (Chief)	Carter	Arizona	Phoenix	ACTIVE
9. Fletcher, B.	Carter	Washington	Seattle	Senior
10. Farris	Carter	Washington	Seattle	Senior
11. Pregerson	Carter	California	Woodland Hills	ACTIVE
12. Alarcon	Carter	California	Los Angeles	Senior
13. Ferguson	Carter	California	Santa Ana	Senior
14. Nelson, D.	Carter	California	Pasadena	Senior
15. Canby	Carter	Arizona	Phoenix	Senior
16. Boochever	Carter	California	Pasadena	Senior
17. Reinhardt	Carter	California	Los Angeles	ACTIVE
18. Beezer	Reagan	Washington	Seattle	Senior
19. Hall	Reagan	California	Pasadena	Senior
20. Brunetti	Reagan	Nevada	Reno	Senior
21. Kozinski	Reagan	California	Pasadena	ACTIVE
22. Noonan	Reagan	California	San Francisco	Senior
23. Thompson	Reagan	California	San Diego	Senior
24. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
25. Leavy	Reagan	Oregon	Portland	Senior
26. Trott	Reagan	Idaho	Boise	ACTIVE
27. Fernandez	G.H.W. Bush	California	Pasadena	Senior
28. Rymer	G.H.W. Bush	California	Pasadena	ACTIVE
29. Nelson, T.	G.H.W. Bush	Idaho	Boise	ACTIVE
30. Kleinfeld	G.H.W. Bush	Alaska	Fairbanks	ACTIVE
31. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
32. Tashima	Clinton	California	Pasadena	ACTIVE
33. Thomas	Clinton	Montana	Billings	ACTIVE
34. Silverman	Clinton	Arizona	Phoenix	ACTIVE
35. Graber	Clinton	Oregon	Portland	ACTIVE
36. McKeown	Clinton	California	San Diego	ACTIVE
37. Wardlaw	Clinton	California	Pasadena	ACTIVE
38. Fletcher, W.	Clinton	California	San Francisco	ACTIVE
39. Fisher	Clinton	California	Pasadena	ACTIVE
40. Gould	Clinton	Washington	Seattle	ACTIVE
41. Paez	Clinton	California	Pasadena	ACTIVE
42. Berzon	Clinton	California	San Francisco	ACTIVE
43. Tallman	Clinton	Washington	Seattle	ACTIVE
44. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
45. Clifton	G.W. Bush	Hawaii	Honolulu	ACTIVE
46. Bybee	G.W. Bush	Nevada	Las Vegas	ACTIVE
47. Callahan	G.W. Bush	California	Sacramento	ACTIVE
48. Bea	G.W. Bush	California	San Francisco	ACTIVE
49. [Kuhl]	G.W. Bush	California	Pasadena	Nominee
50. [Myers]	G.W. Bush	Idaho	Boise	Nominee*

SUMMARY:	**Authorized Judgeships**	**28**
	ACTIVE Judges	**27**
	Senior Judges	**+ 21**
	Sitting Judges	**48**
	Nominees pending	**1**
	Nominees awaiting vacancy	**+ 1**
	Total, including nominees	**50**

* Mr. Myers will succeed Judge Nelson as ACTIVE upon confirmation on or after November 14, 2003.

Exhibit 4

Judges for the "New" Ninth Circuit After Split

(as of October 21, 2003)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	Senior
2. Goodwin	Nixon	California	Pasadena	Senior
3. Wallace	Nixon	California	San Diego	Senior
4. Sneed	Nixon	California	San Francisco	Senior
5. Hug	Carter	Nevada	Reno	Senior
6. Schroeder	Carter	Arizona	Phoenix	ACTIVE
7. Pregerson	Carter	California	Woodland Hills	ACTIVE
8. Alarcon	Carter	California	Los Angeles	Senior
9. Ferguson	Carter	California	Santa Ana	Senior
10. Nelson, D.	Carter	California	Pasadena	Senior
11. Canby	Carter	Arizona	Phoenix	Senior
12. Boochever	Carter	California	Pasadena	Senior
13. Reinhardt	Carter	California	Los Angeles	ACTIVE
14. Hall	Reagan	California	Pasadena	Senior
15. Brunetti	Reagan	Nevada	Reno	Senior
16. Kozinski	Reagan	California	Pasadena	ACTIVE
17. Noonan	Reagan	California	San Francisco	Senior
18. Thompson	Reagan	California	San Diego	Senior
19. Fernandez	Bush	California	Pasadena	Senior
20. Rymer	Bush	California	Pasadena	ACTIVE
21. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
22. Tashima	Clinton	California	Pasadena	ACTIVE
23. Silverman	Clinton	Arizona	Phoenix	ACTIVE
24. McKeown	Clinton	California	San Diego	ACTIVE
25. Wardlaw	Clinton	California	Pasadena	ACTIVE
26. Fletcher, W.	Clinton	California	San Francisco	ACTIVE
27. Fisher	Clinton	California	Pasadena	ACTIVE
28. Paez	Clinton	California	Pasadena	ACTIVE
29. Berzon	Clinton	California	San Francisco	ACTIVE
30. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
31. Bybee	Bush	Nevada	Las Vegas	ACTIVE
32. Callahan	Bush	California	Sacramento	ACTIVE
33. Bea	Bush	California	San Francisco	ACTIVE
34. [Kuhl]	Bush	California	Pasadena	Nominee
35. [New vacancy]		- -	- -	Vacancy
36. [New vacancy]		- -	- -	Vacancy
37. [Temp. vacancy]*		- -	- -	Vacancy
38. [Temp. vacancy]*		- -	- -	Vacancy
39. [Future vacancy]**		- -	- -	Vacancy
40. [Future vacancy]**		- -	- -	Vacancy
41. [Future vacancy]**		- -	- -	Vacancy

SUMMARY:		
	Authorized Judgeships	**19**
	ACTIVE Judges	**18**
	Senior Judges	**+15**
	Sitting Judges	**33**
	Nominees pending	**1**
	Nominees awaiting vacancy	**0**
	New Judgeships	**+ 7**
	Total	**41**

* Temporary judgeship not to be filled after 10 years
** New judgeship created on January 21, 2005

Exhibit 5

Judges for the New Twelfth Circuit After Split

(as of October 21, 2003)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Choy	Nixon	Hawaii	Honolulu	Senior
2. Skopil	Carter	Oregon	Portland	Senior
3. Fletcher, B.	Carter	Washington	Seattle	Senior
4. Farris	Carter	Washington	Seattle	Senior
5. Beezer	Reagan	Washington	Seattle	Senior
6. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
7. Leavy	Reagan	Oregon	Portland	Senior
8. Trott	Reagan	Idaho	Boise	ACTIVE
9. Nelson, T.	Bush	Idaho	Boise	ACTIVE
10. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
11. Thomas	Clinton	Montana	Billings	ACTIVE
12. Graber	Clinton	Oregon	Portland	ACTIVE
13. Gould	Clinton	Washington	Seattle	ACTIVE
14. Tallman	Clinton	Washington	Seattle	ACTIVE
15. Clifton	Bush	Hawaii	Honolulu	ACTIVE
16. [Myers]	Bush	Idaho	Boise	Nominee*

SUMMARY:	**Authorized Judgeships**	**9**
	ACTIVE Judges	**9**
	Senior Judges	**+ 6**
	Sitting Judges	**15**
	Nominees pending	**0**
	Nominees awaiting vacancy	**1**
	New Judgeships	**+ 0**
	Total	**16**

* Mr. Myers will succeed Judge Nelson as ACTIVE upon confirmation on or after November 14, 2003.

Exhibit 6

Authorized Judgeships per Circuit

SOURCE: 28 U.S.C. § 44 (2003)

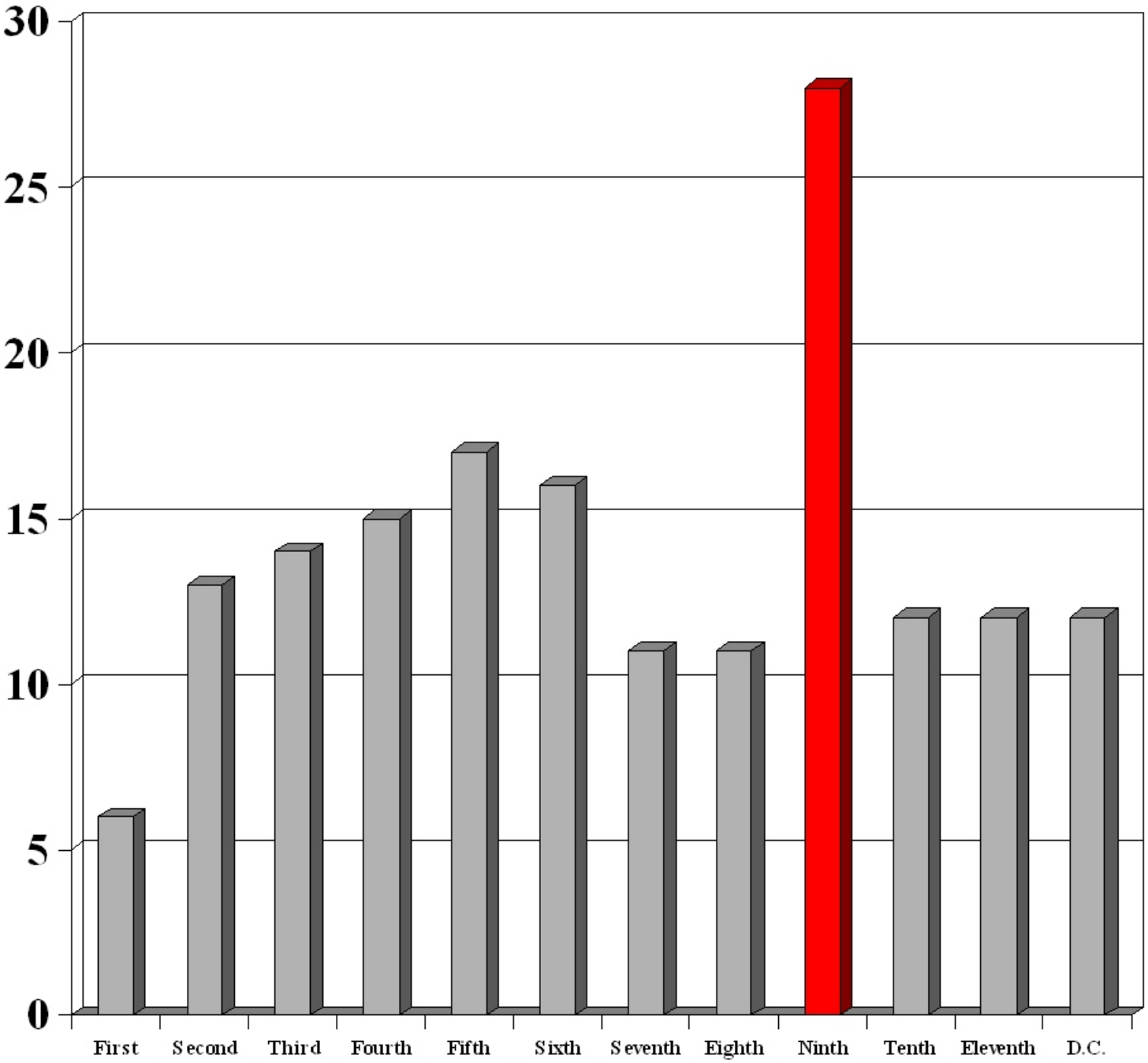
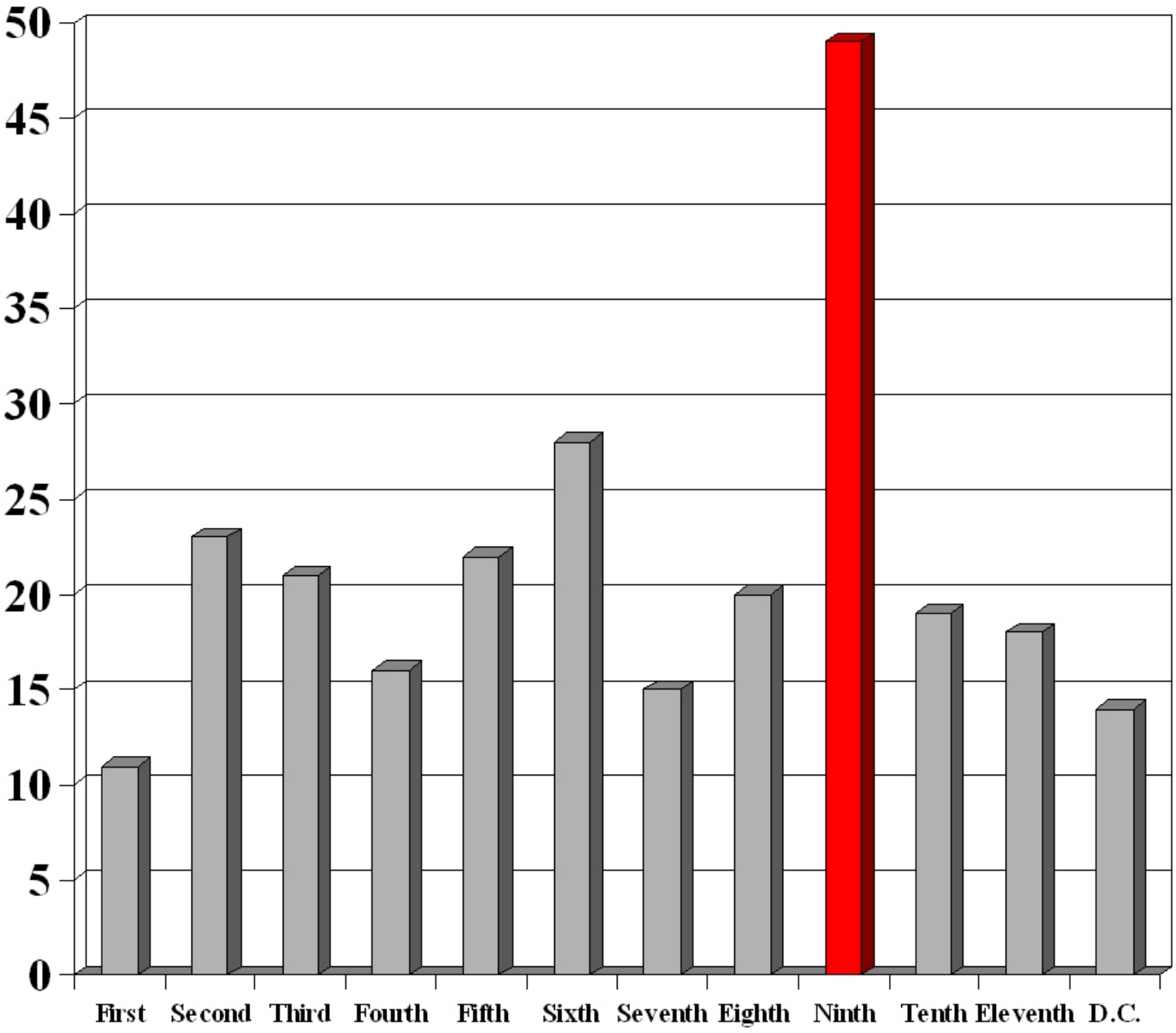


Exhibit 7

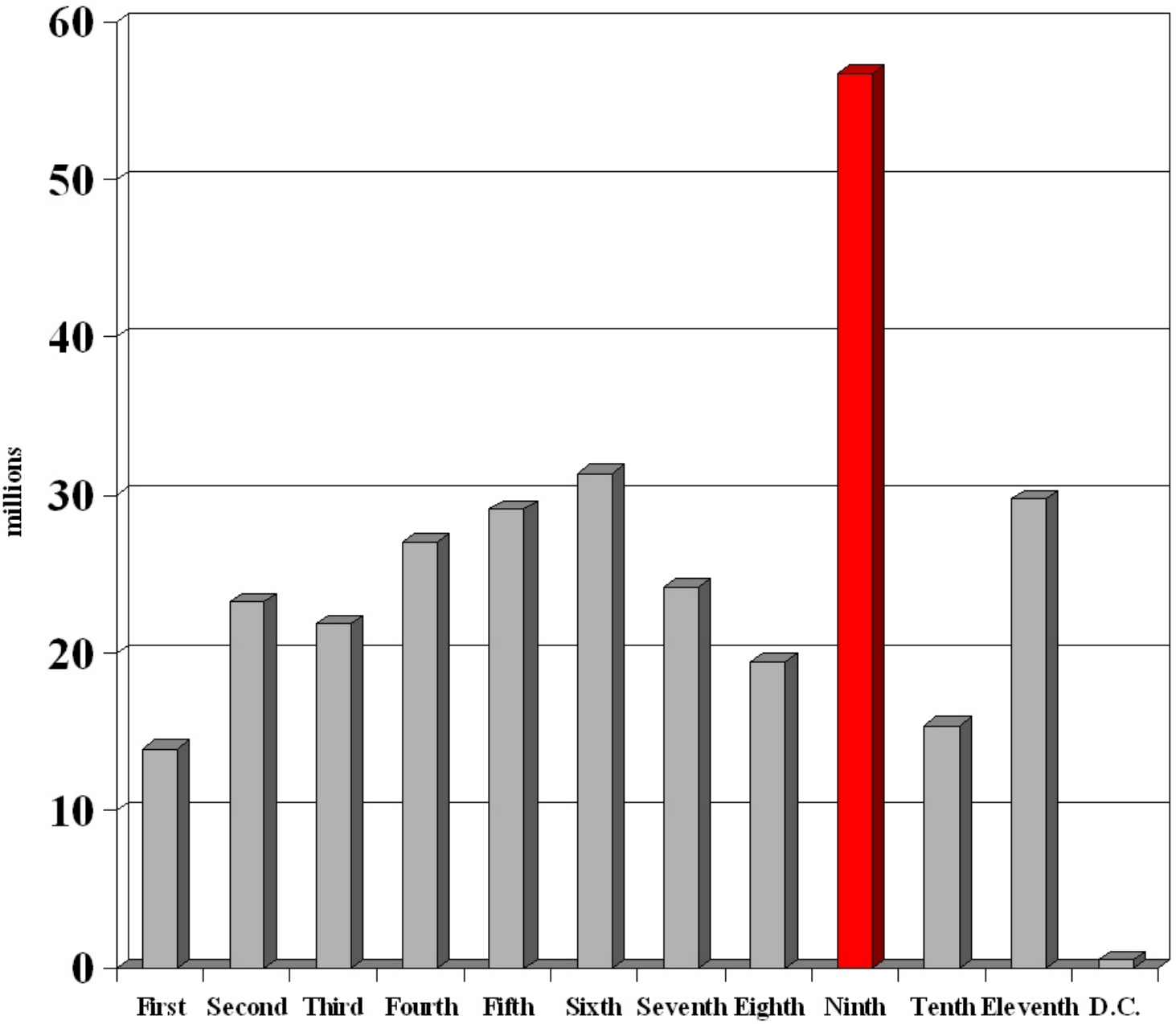
Total Judges per Circuit
(Authorized + Senior)



SOURCE: 28 U.S.C. § 44 (2003); 2002 Appellate Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsa2002.pl

Exhibit 8

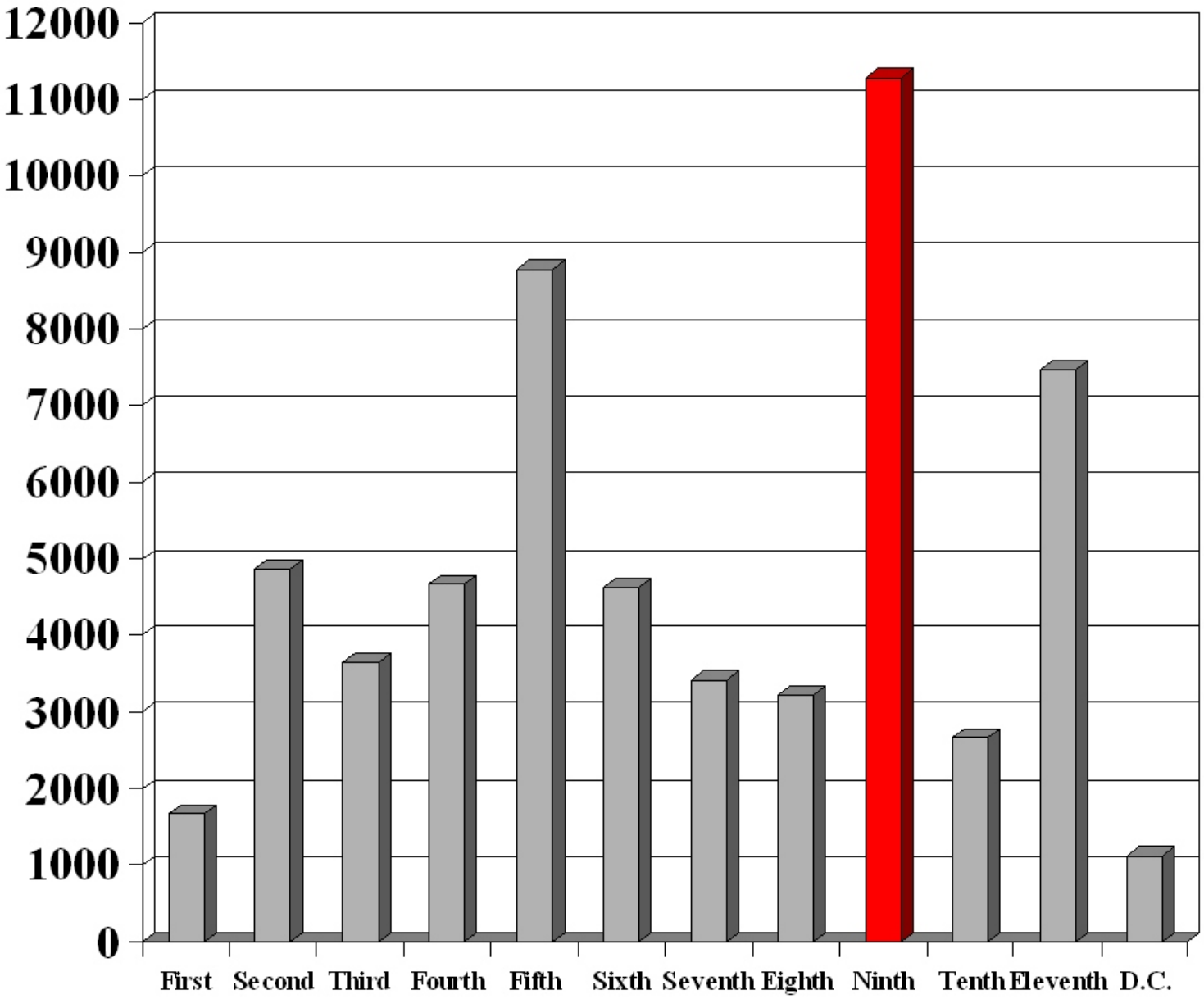
Population by Circuit



SOURCE: U.S. Census Bureau, States Ranked by Estimated 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php; U.S. Census Bureau, Census 2000 Results for the Island Areas, http://www.census.gov/population/www/cen2000/islandareas.html and www.census.gov/ipc/ww/idbsum.html

Exhibit 9

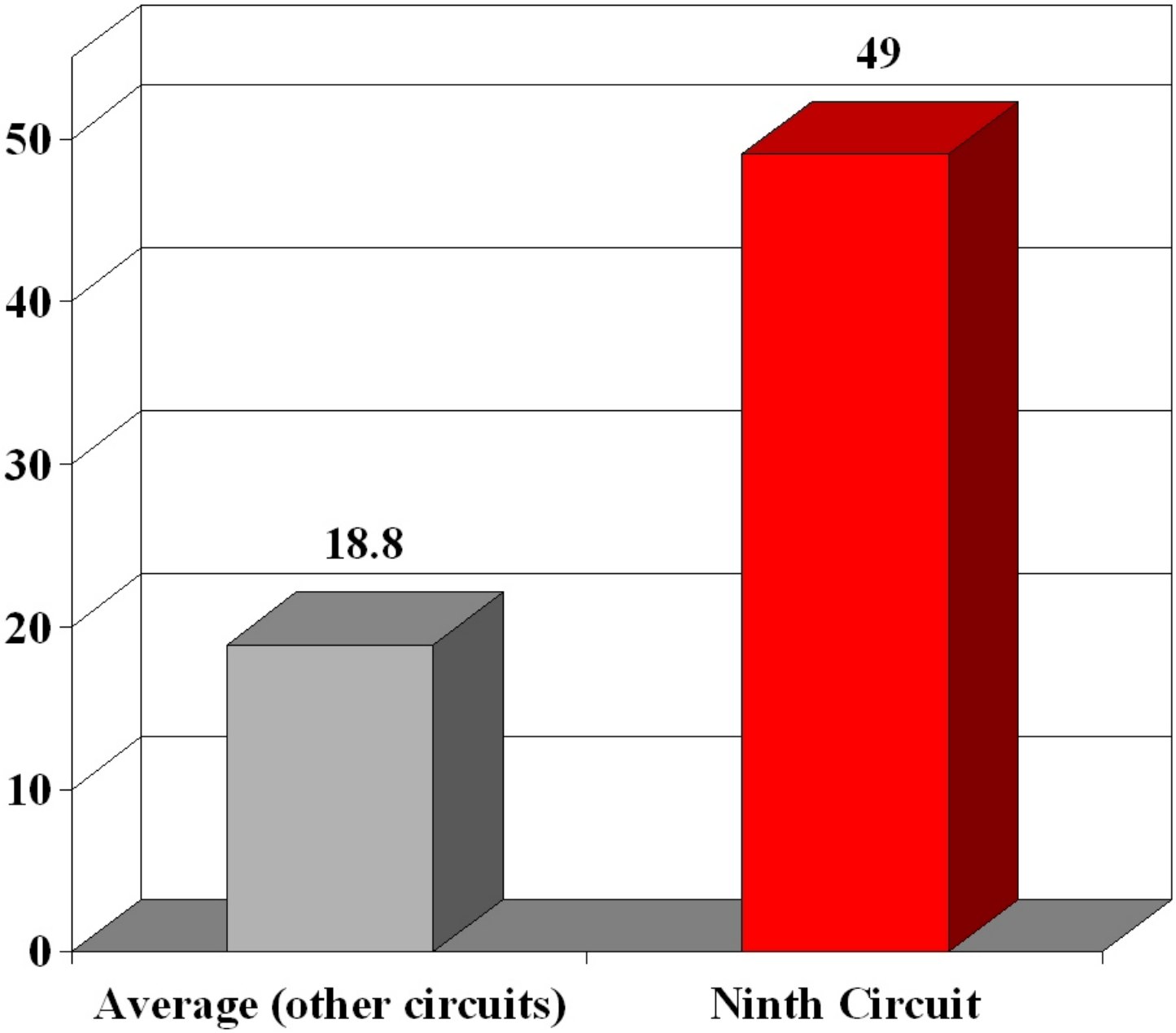
Number of Appeals Filed per Circuit



SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html

Exhibit 10

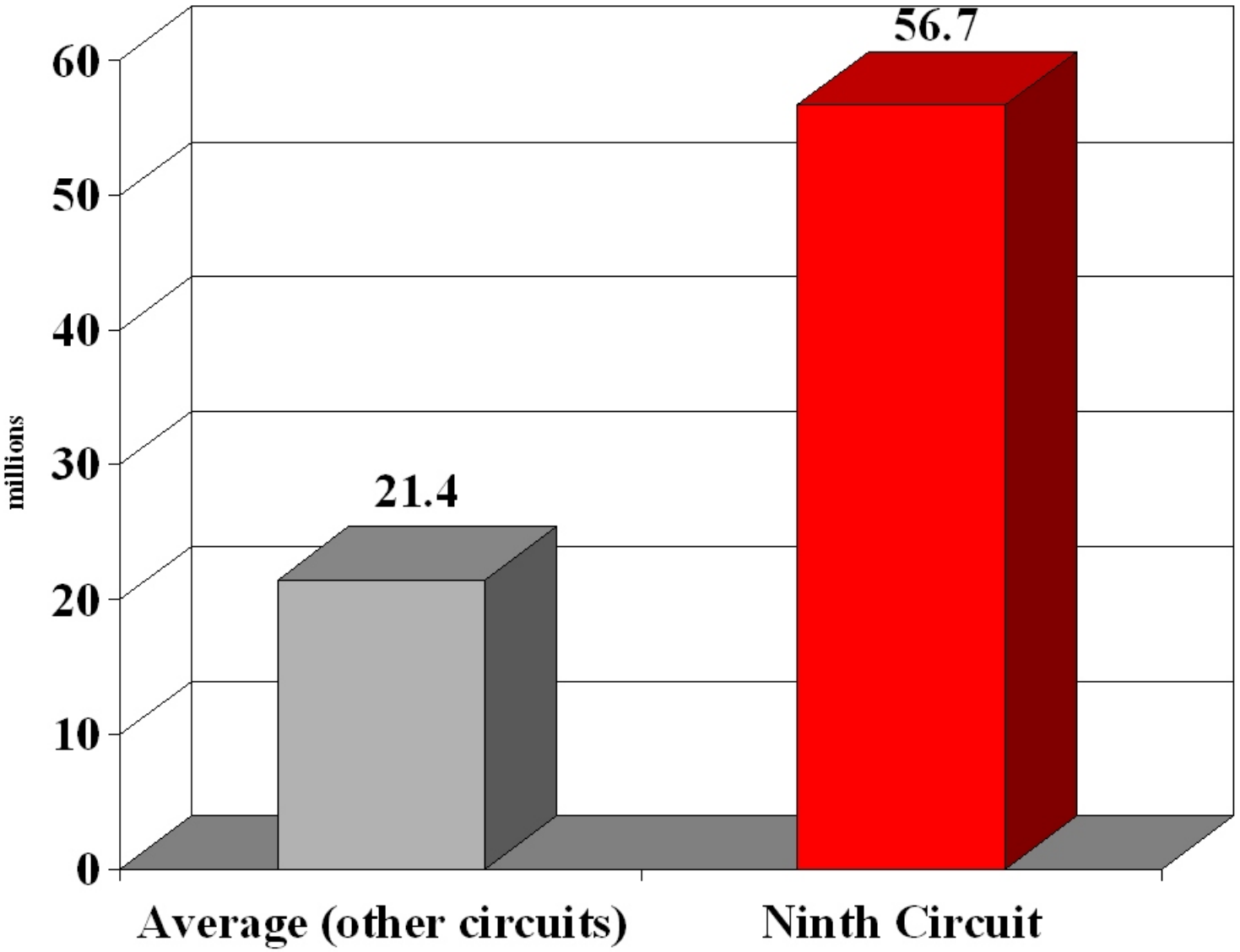
The Ninth Circuit has more than double the average of total judges (authorized + senior) of all other circuits.



SOURCE: 28 U.S.C. § 44 (2003); 2002 Appellate Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsa2002.pl

Exhibit 11

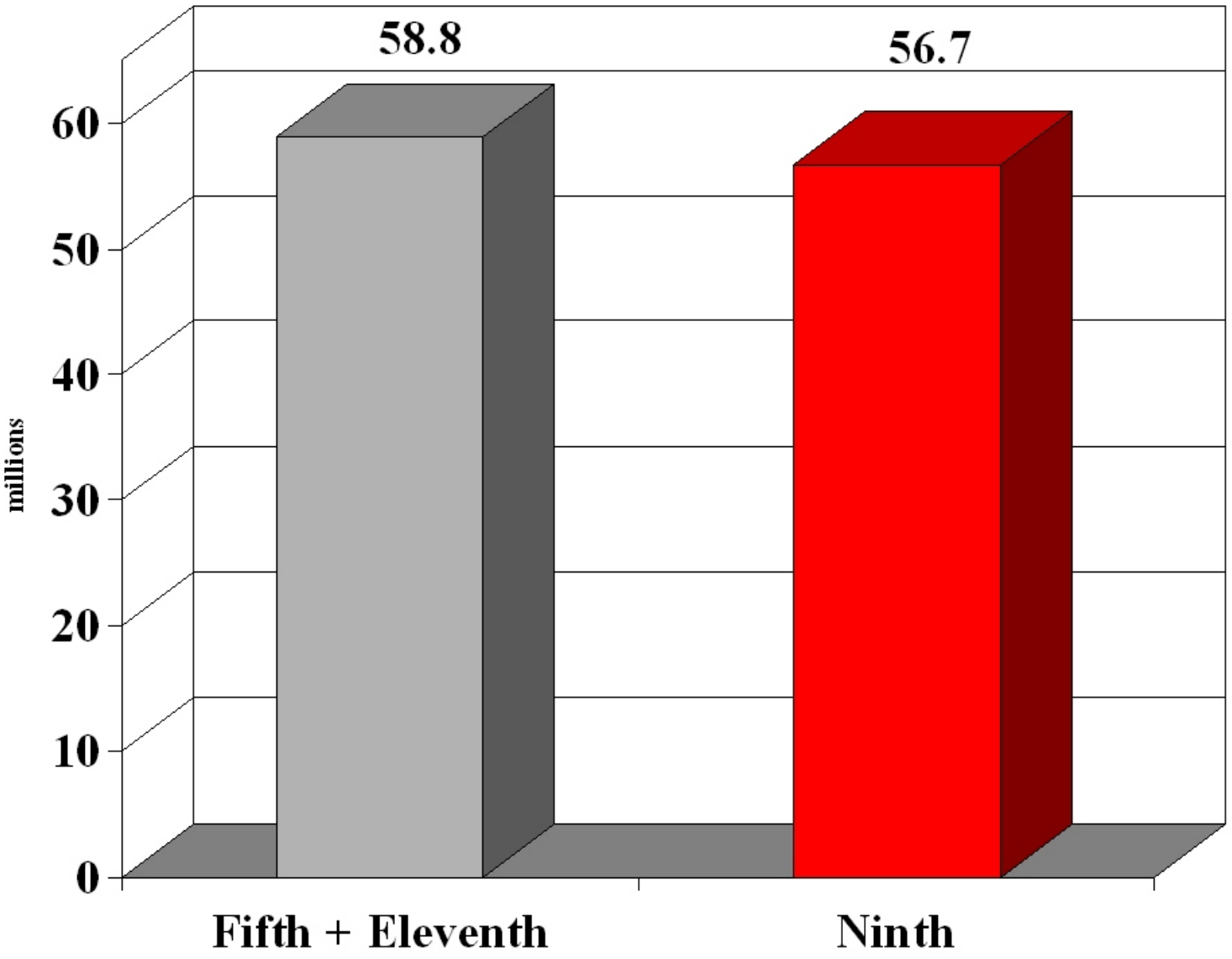
The Ninth Circuit has more than double the average population of all other circuits.



SOURCE: U.S. Census Bureau, States Ranked by Estimated July 1, 2001 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php; U.S. Census Bureau, Census 2000 Results for the Island Areas, http://www.census.gov/population/www/cen2000/islandareas.html and www.census.gov/ipc/ww/idbsum.html

Exhibit 12

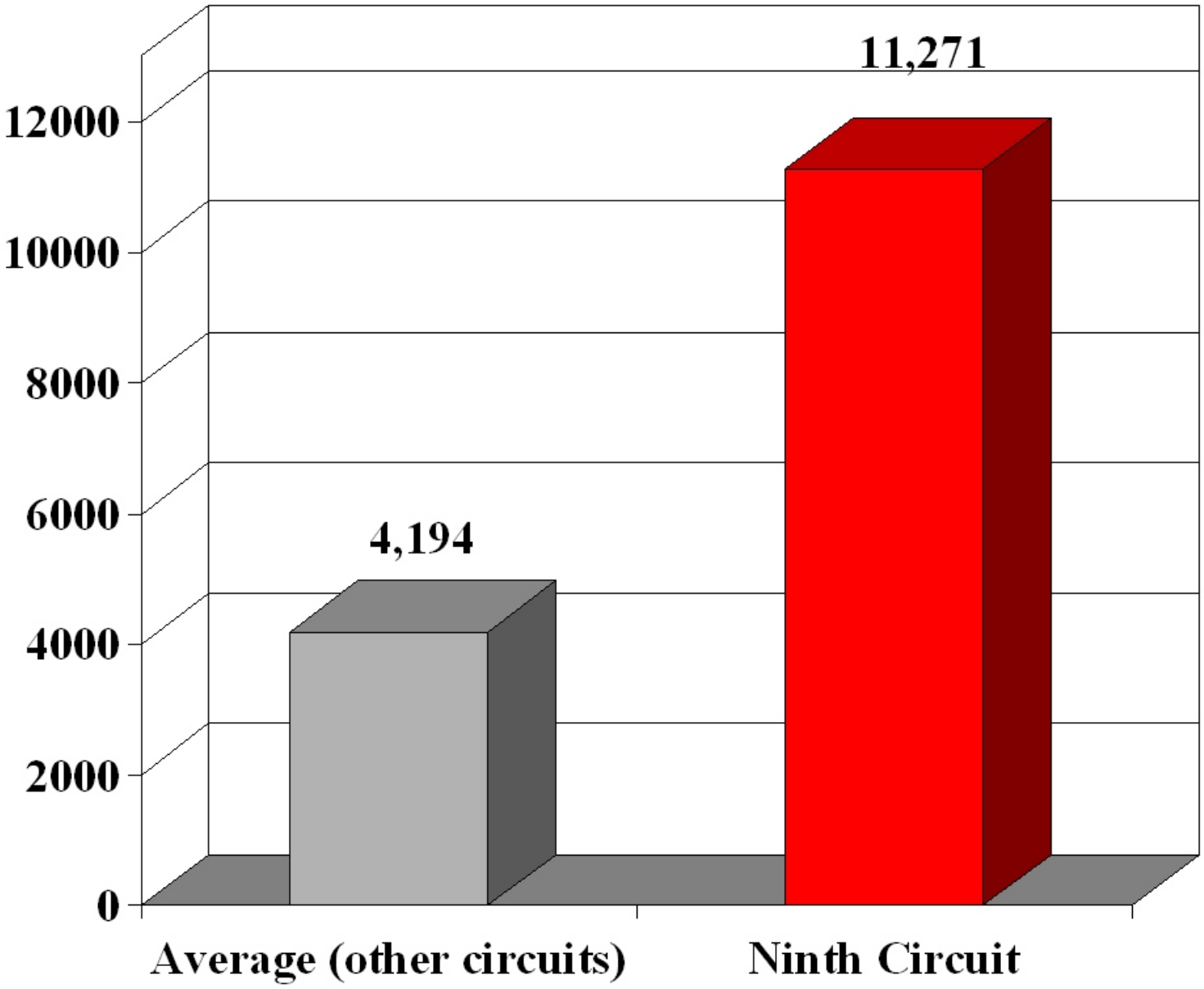
The Eleventh Circuit was carved out of the old Fifth Circuit in 1981 largely because of size. Today's Ninth Circuit is <u>over 96%</u> of the size of the current Fifth and Eleventh <u>combined</u>!



SOURCE: Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, Table B: U.S. Courts of Appeals -- Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2002, http://www.uscourts.gov/judbus2002/contents.html

Exhibit 13

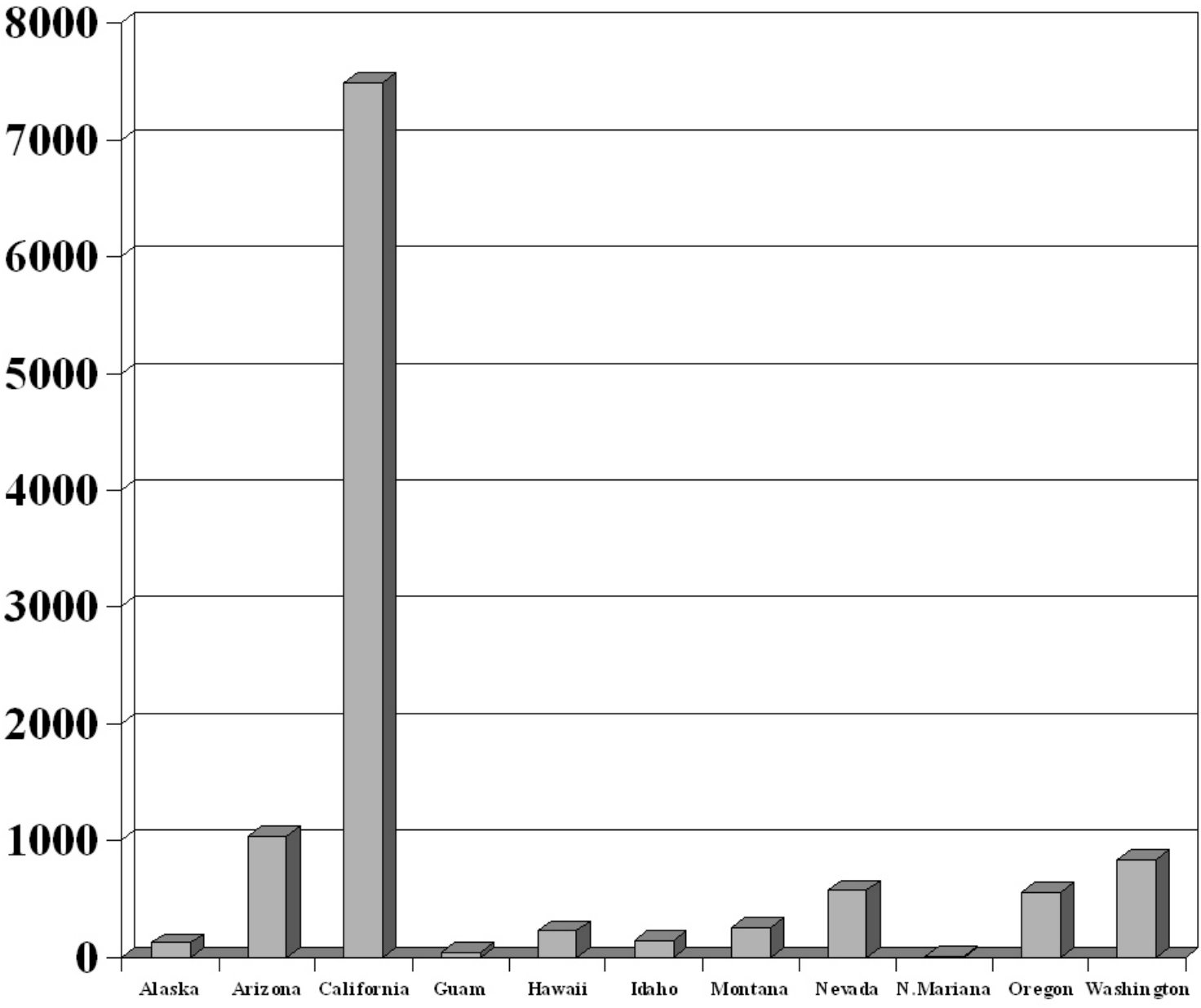
The Ninth Circuit has nearly triple the average number of appeals filed of all other circuits.



SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html

Exhibit 14

California alone accounts for two thirds of all appeals filed within the Ninth Circuit.



SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002.

Exhibit 15

Number of Judges by Circuit

Court	Headquarter City	Appellate Judgeships	%	Senior Judges	%	Total Judges*	% U.S.
First	Boston, MA	6	3.6%	5	5.6%	11	4.3%
Second	New York, NY	13	7.8%	11	12.2%	23	9.0%
Third	Philadelphia, PA	14	8.4%	7	7.8%	21	8.2%
Fourth	Richmond, VA	15	9.0%	1	1.1%	16	6.3%
Fifth	New Orleans, LA	17	10.2%	5	5.6%	22	8.6%
Sixth	Cincinnati, OH	16	9.6%	12	13.3%	28	10.9%
Seventh	Chicago, IL	11	6.6%	4	4.4%	15	5.9%
Eighth	St. Louis, MO	11	6.6%	9	10.0%	20	7.8%
Ninth	San Francisco, CA	28	16.8%	21	23.3%	49	19.1%
Tenth	Denver, CO	12	7.2%	7	7.8%	19	7.4%
Eleventh	Atlanta, GA	12	7.2%	6	6.7%	18	7.0%
D.C.	Washington, DC	12	7.2%	2	2.2%	14	5.5%
Total		**167**	**100%**	**90**	**100%**	**256**	**100%**

* Total judges includes authorized judgeships and senior judges.

SOURCE: 28 U.S.C. § 44; 2002 Appellate Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsa2002.pl

Exhibit 16

Population and Caseload by Circuit, 2002 Court Year

Court	Population*	% Pop.	Appeals**	% Appeals
First	13,925,852	4.8%	1,667	2.9%
Second	23,234,627	7.9%	4,870	8.5%
Third	21,841,551	7.5%	3,643	6.3%
Fourth	26,989,881	9.2%	4,658	8.1%
Fifth	29,134,321	10.0%	8,784	15.3%
Sixth	31,361,893	10.7%	4,619	8.0%
Seventh	24,200,884	8.3%	3,418	6.0%
Eighth	19,463,491	6.7%	3,216	5.6%
Ninth	56,715,478	19.4%	11,271	19.6%
Tenth	15,386,158	5.2%	2,661	4.6%
Eleventh	29,759,967	10.2%	7,472	13.0%
D.C.	570,898	0.2%	1,126	2.0%
Total	**292,585,001**	**100%**	**57,405**	**100%**

* All population figures are based on U.S. Census 2002 estimates. The total U.S. population in 2002, which does not include Puerto Rico or island territories, was estimated at 288,368,698.
** Ninth Circuit caseload numbers were generated by its internal AIMS database. All other caseload numbers come from the Administrative Office of the United States Courts. Both sets of numbers cover the same time period: Oct. 1, 2001-Sept. 30, 2002.

SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html; U.S. Census Bureau, States Ranked by Estimated July 1, 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php; U.S. Census Bureau, 2002 Estimates for the Island Areas, http://www.census.gov/ipc/www/idbsum.html.

Exhibit 17

Population and Number of Appeals by District Within Ninth Circuit, 2002 Court Year

Court	City	Authorized District Judgeships	Population*	% Pop.	Appeals	% Appeals
D. Alaska	Anchorage	3	643,786	1.1%	118	1.0%
D. Arizona	Phoenix	12	5,456,453	9.6%	1,026	9.1%
C.D. California	Los Angeles	27	17,700,680	31.2%	3,910	34.7%
E.D. California	Sacramento	7**	7,042,861	11.9%	995	8.8%
N.D. California	San Francisco	14	7,488,670	13.6%	1,695	15.0%
S.D. California	San Diego	8	3,052,908	5.5%	885	7.9%
D. Guam	Agana	1	161,057	0.3%	34	0.3%
D. Hawaii	Honolulu	4**	1,244,898	2.2%	229	2.0%
D. Idaho	Boise	2	1,341,131	2.4%	143	1.3%
D. Montana	Helena	3	909,453	1.6%	260	2.3%
D. Nevada	Las Vegas	7	2,173,491	3.8%	574	5.1%
D. N. Mariana Is.	Saipan	1	74,003	0.1%	16	0.1%
D. Oregon	Portland	6	3,521,515	6.2%	561	5.0%
E.D. Washington	Spokane	4	1,336,844	2.4%	174	1.5%
W.D. Washington	Seattle	7	4,732,512	8.4%	651	5.8%
TOTAL		**107**	**56,715,478**	**100%**	**11,271**	**100%**

* All population figures were calculated using 2002 estimates. Populations of California and Washington districts were calculated by adding the relevant 2002 U.S. Census county population estimates.
** Includes one temporary judgeship.

SOURCE: 28 U.S.C. § 133; Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; U.S. Census Bureau, States Ranked by Estimated July 1, 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2001-04.php; U.S. Census Bureau, 2002 Estimates for the Island Areas, http://www.census.gov/ipc/www/idbsum.html.

Exhibit 18

Population and Number of Appeals by State Within Ninth Circuit, 2002 Court Year

State	Authorized District Judgeships	Population*	% Pop.	Appeals	% Appeals
Alaska	3	643,786	1.1%	118	1.0%
Arizona	12	5,456,453	9.6%	1,026	9.1%
California	56**	35,116,033	61.9%	7,485	66.4%
Guam	1	163,593	0.3%	34	0.3%
Hawaii	4**	1,244,898	2.2%	229	2.0%
Idaho	2	1,341,131	2.4%	143	1.3%
Montana	3	909,453	1.6%	260	2.3%
Nevada	7	2,173,491	3.8%	574	5.1%
N. Mariana Islands	1	76,129	0.1%	16	0.1%
Oregon	6	3,521,515	6.2%	561	5.0%
Washington	11	6,068,996	10.7%	825	7.3%
TOTAL	**107**	**56,715,478**	**100%**	**11,271**	**100%**

* All population figures were calculated using 2002 U.S. Census estimates.
** Includes one temporary judgeship.

SOURCE: 28 U.S.C. § 133; Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html; U.S. Census Bureau, States Ranked by Estimated July 1, 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2001-04.php; U.S. Census Bureau, 2002 Estimates for the Island Areas, http://www.census.gov/ipc/www/idbsum.html.